Filed 3/30/15 P. .v Tyler CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TORIS TAVELLE TYLER, Defendant and Appellant.	G050868 (Super. Ct. No. RIF1103458) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside, David A. Gunn and Charles J. Koosed, Judges. Reversed with directions.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Toris Tavelle Tyler of possessing marijuana for sale (Health & Saf. Code, § 11359) and being a felon in possession of a firearm (former Pen. Code, §§ 12021, subd. (a)(1), 29800, subd. (a)(1); all further statutory citations are to the Penal Code unless noted).[1] The jury also found he was armed with a firearm when he committed the marijuana offense (§ 12022, subd. (a)(1)). Tyler contends the trial court erred in failing to adjudicate his motions to quash and traverse a search warrant. He also raises several sentencing issues, arguing imposition of an eight-month consecutive term for felon in possession of a firearm violated section 654, the court should have allowed him to serve his custody time in county jail rather than state prison, and the court erred in calculating his conduct credits. We agree with his contention the trial court failed to review the sealed search warrant for probable cause and therefore we must reverse the judgment and direct the trial court to conduct a hearing on Tyler's motions attacking the search warrants. We agree with Tyler the trial court erred in failing to stay his sentence for felon in possession of a firearm. Finally, we conclude Tyler must serve his sentence in state prison, and agree with the parties Tyler is entitled to 30 days of additional conduct credit.

I

FACTUAL AND PROCEDURAL BACKGROUND

On June 10, 2011, Riverside County Sheriff deputies executed a search warrant at Tyler's residence in Moreno Valley. Chantay Youngblood, who was home at the time of the search, informed deputies she had lived there for three years. Deputies found approximately five pounds of marijuana and a scale in a white bucket in the master bedroom closet. The closet also contained male clothing and shoes. Deputies found two

[1] Former section 12021, subdivision (a) was repealed effective January 1, 2012. Its provisions were reenacted without substantive change as section 29800, subdivision (a). (See *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 1; Stats. 2010, ch. 711, § 6.) The complaint and original information alleged a violation of section 12021, subsequent amendments to the information referenced section 29800.

baggies of marijuana and a scale in the top drawer of a nightstand, and a loaded Smith & Wesson revolver, registered to a Francisco Amezqua, in the next drawer down. Deputies found mail addressed to Tyler at the residence on and near the nightstand. A blue duffel bag in the master bedroom contained more marijuana and a scale. A black bag in the kitchen pantry contained approximately two more pounds of marijuana.

Deputy Mario Moreno arrested Tyler in a traffic stop a short time after the investigators searched Tyler's residence. Deputies found two baggies of marijuana in a center console along with a cell phone, and $687 on Tyler's person. An incoming text message on the phone stated, "Hit me back. I need a pound." While being driven to the police station, Tyler told Moreno everything found at the house belonged to him. In a recorded interview with Deputy Ernie Esquibel a few hours later, Tyler admitted all the marijuana found in the house belonged to him, but claimed the gun found in the house belonged to the father of the woman who lived there. He admitted he knew where the gun was located, but claimed he had not touched it. In an unrecorded second interview about an hour later, Tyler admitted he carried the gun around the house for protection when the woman who lived at the residence was out of town.

Following trial in June 2013, the jury convicted Tyler as noted above. In August 2013 the court imposed an aggregate three year eight month prison sentence, comprised of the midterm of two years for possession of marijuana for sale, one year for the firearm enhancement, and eight months for felon in possession.

II

DISCUSSION

Tyler contends the trial court violated his right to due process because it denied his request to determine whether probable cause supported issuance of the sealed search warrant. The Attorney General concedes no judge ever decided the probable cause issue, but suggests we should independently decide the issue rather than remand the matter for a hearing. We are not persuaded to adopt this course. As we explain below,

the appropriate remedy is to have the trial court conduct a hearing on Tyler's motions to quash and traverse.

The prosecutor filed a criminal complaint against Tyler based on the evidence uncovered during the execution of the search warrant. In September 2011, Tyler asked the court to unseal the "warrant," or alternatively to review the warrant and release a redacted version. Tyler's motion relied on *People v. Hobbs* (1994) 7 Cal.4th 948 *(Hobbs*), which discussed the procedures courts must use when a defendant moves to quash and traverse a warrant after the magistrate has sealed the search warrant affidavit to maintain an informant's confidentiality.

On September 27, the court (Judge Sillman) conducted an in camera hearing with the prosecutor and the affiant, Deputy Ernie Esquibel. Esquibel testified and described his contacts with a confidential reliable informant (CRI) and the CRI's information that lead to the issuance of the search warrant. After reviewing the warrant materials, the court found the CRI's information was incriminating rather than exculpatory and grounds existed to maintain the CRI's confidentiality. The court also found nondisclosure would not deny Tyler a fair trial, and the issuing magistrate properly sealed the confidential portion of the affidavit ("Confidential *Hobbs* Attachment "A"). After the court issued its ruling, Tyler's lawyer asked for more time to consider whether to file a motion to quash or traverse the warrant. The court declared the defense would be allowed to make those motions later.

In October 2011, Tyler moved to quash and traverse the warrant, complaining that he could not determine whether probable cause supported issuance of the warrant because portions of the warrant remained sealed. The prosecution opposed the motion, declaring that Judge Sillman already had reviewed the "sufficiency of the warrant." On April 17, 2012, Judge Koosed denied Tyler's motion, explaining it would not decide the substantive issues because Judge Sillman already denied the same motion.

In November 2012, Tyler again asked the court to review the warrant and affidavit under *Hobbs* "to see if the warrant was proper." He also moved for an order unsealing the search warrant and supporting affidavits, explaining the defense had "not been able to review any of the foundational warrant materials, save for the Search Warrant Notice." A newly assigned prosecutor opposed the motions on the ground Judges Sillman and Koosed already had heard and denied them. In May 2013, Judge Gunn denied both motions because the court previously denied the identical motions and there was nothing new to support rehearing the matter.

The parties agree Judge Sillman treated Tyler's initial motion as a motion to unseal the affidavit and never determined whether probable cause supported issuance of the warrant or whether the affidavit contained material misrepresentations. Judges Koosed and Gunn erroneously assumed Judge Sillman had ruled on the motions to quash and to traverse. Accordingly, they erred in refusing to entertain the substantive claims Tyler raised in his motions. Tyler contends we must remand the matter to the trial court so he may pursue his suppression motion. The Attorney General suggests we may avoid remanding the matter by independently reviewing whether probable cause supported issuance of the warrant. We conclude remand is the appropriate remedy based on the nature of the *Hobbs* procedures.

In *Hobbs*, the Supreme Court concluded courts may seal a search warrant affidavit to protect a confidential informant's identity. A defense motion to quash or traverse the search warrant requires the court to conduct an in camera hearing outside the presence of the defense. (*Hobbs*, *supra*, 7 Cal.4th at p. 972; *People v. Luttenberger* (1990) 50 Cal.3d 1.) Initially, the court determines whether valid grounds exist for maintaining the confidentiality of the informant's identity, and whether the extent of the sealing is necessary to avoid revealing the informant's identity. (*Hobbs*, *supra*, 7 Cal.4th at p. 972.) The court must disclose any portion of the sealed material if doing so would not divulge the informant's identity. (*Hobbs*, at p. 972, fn. 7.) The trial court must allow

defense counsel to submit written questions for any witness called to testify at the in camera proceeding. (*Id.* at p. 973.) The court must examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires, such as police reports and other information regarding the informant and the informant's reliability. The court may call and question the affiant, the informant, or any other witness whose testimony it deems necessary to resolve the issues. (*Ibid.*)

Where the defendant has moved to traverse the warrant, the court should determine whether the affidavit includes a deliberately false statement, or a statement made with reckless disregard for the truth, and whether the false statement is necessary to the probable cause finding. (*Hobbs*, *supra*, 7 Cal.4th at p. 974; *Franks v. Delaware* (1978) 438 U.S. 154, 155-156.) If the trial court determines the materials and testimony at the hearing do not support defendant's charges of material misrepresentation, the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse. (*Hobbs*, *supra*, 7 Cal.4th at p. 974.) If the court finds a reasonable probability the affidavit includes a deliberately false statement, or a statement made with reckless disregard for the truth, and the statement is material to the probable cause finding, the prosecutor has the option of disclosing the sealed materials, in which case the motion to traverse can then proceed to decision with the benefit of this additional evidence, or alternatively, suffer the entry of an adverse order on the motion to traverse. (*Hobbs*, at pp. 974-975.)

In a motion to quash the search warrant (§ 1538.5), the court should determine whether, under the "'totality of the circumstances'" described in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was "'a fair probability'" that investigators would find contraband or evidence of a crime in the place to be searched. (*Hobbs*, *supra*, 7 Cal.4th at p. 975; *Illinois v. Gates* (1983) 462 U.S. 213, 238.) If the court determines based on its review of all the relevant

materials, the affidavit and related materials furnished probable cause for issuance of the warrant, the court should report this conclusion to the defendant and enter an order denying the motion to quash. (*Hobbs*, *supra*, 7 Cal.4th at p. 975.) If the court determines "based on its review of all relevant materials and any testimony taken at the in camera hearing . . . there is a reasonable probability" the search warrant affidavit, including the sealed portions, "fails to establish probable cause for issuance of the warrant," the prosecutor may either consent to disclosure of the "sealed materials to the defense, after which the motion to quash can proceed to decision," or the court must grant the motion to quash the warrant. (*Ibid.*)

Here, the appropriate disposition is to reverse with directions to the trial court to conduct a hearing on Tyler's motions to quash and traverse. Preliminarily, it is unclear what portion of the warrant remained sealed after Judge Sillman's review. During the in camera hearing, Judge Sillman found only the portion of the search warrant described as the Confidential *Hobbs* Attachment "A" was properly sealed and ordered it to remain sealed. But in his subsequent moving papers, Tyler's counsel observed the "warrant" remained under seal therefore the defense did "not know whether . . . the evidence obtained was described in the warrant." Assuming the court ordered the warrant and the affidavit should remain sealed, we could independently determine whether Judge Sillman correctly denied the motion to unseal. But *Hobbs* also requires a reassessment of the necessity for sealing at the time the motions to quash and traverse are heard in the trial court. This court is in no position to determine whether sealing *remains* necessary to protect the identity of the CRI. Finally, while this court could determine whether the sealed affidavit(s) provided the magistrate with probable cause to issue the warrant, Tyler's motions also invoked *Hobbs* and *Franks*. As explained above, *Hobbs* requires the trial court to employ a procedure to ascertain the underlying veracity of statements made in the warrant affidavit. This court is in no position to conduct that inquiry.

Accordingly, we decline to resolve the issues raised by Tyler's motions. We conditionally reverse the judgment and direct the trial court to conduct a hearing on Tyler's motions.

A. *Section 654*

Tyler also argues the trial court violated section 654 by imposing an eight-month term for felon in possession of a firearm (§ 29800, subd. (a)(1); count 2) in addition to imposing an armed enhancement (§ 12022, subd. (a)(1)) on Tyler's conviction for possessing marijuana for sale (Health & Saf. Code, § 11359; count 1). The trial court concluded section 654 did not apply because felon in possession "is really a status offense. By virtue of his status of being a convicted felon and just having the gun in his possession, he violates that law. It has nothing really to do with possession for sale of marijuana. It's got nothing really to do with him being armed while possessing the marijuana."~**(rt225)**~

Section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 also bars multiple punishments where a course of conduct violating more than one statute constitutes an indivisible transaction. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Whether a course of conduct is a divisible transaction depends on the intent and objective of the actor. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1215; *People v. McFarland* (1962) 58 Cal.2d 748, 762.) Where all the acts and offenses are "merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Section 654 "insure[s] that the defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California* (1960) 55 Cal.2d 11, 20, disapproved of on other grounds in *People v.*

Correa (2012) 54 Cal.4th 331 [felon apprehended in simultaneous possession of seven illegal firearms may be punished seven separate times].) Whether section 654 applies is a question of fact for the trial court, and we must uphold the court's determination if supported by substantial evidence. (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1289.)

Here, Tyler committed multiple criminal "acts" triggering punishment. He possessed marijuana with intent to sell, he armed himself with a firearm while possessing marijuana for sale, and he possessed a firearm as a convicted felon. The trial court could separately punish him for both possessing marijuana for sale and possessing a firearm as a felon without running afoul of section 654. (See *People v. Jones* (2012) 54 Cal.4th 350, 358 (*Jones*) [simultaneous possession of different items of contraband are separate acts under section 654].) The issue here is whether the trial court could punish Tyler for being armed with a firearm, and possessing the same firearm, under the circumstances of this case.

In *Jones*, the Supreme Court held "a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654." (*Jones, supra,* 54 Cal.4th at p. 357.) There, the police searched the defendant's car and found a loaded .38-caliber revolver. The defendant, a convicted felon, claimed he bought the gun three days earlier "'for protection,'" and explained he kept the gun at his grandmother's house and "'just picked the gun up from there and that's why the gun was in the car.'" (*Id*. at p. 352.) The jury convicted him of possession of a firearm by a felon, carrying a readily accessible concealed and unregistered firearm, and carrying an unregistered loaded firearm in public. (*Ibid*.)

Jones disapproved *People v. Harrison* (1969) 1 Cal.App.3d 115 (*Harrison*), which had permitted separate punishment for possession of a concealable firearm by a felon and possessing a loaded firearm even though both crimes involved the same firearm. *Jones* also overruled *In re Hayes* (1969) 70 Cal.2d 604, which permitted

punishing the defendant for simultaneously driving while intoxicated and while possessing an invalid license. *Jones* explained the court's rationale in *Harrison* and *Hayes* bore "little relationship to section 654's actual language," and rejected the *Hayes* rationale because it would permit multiple punishment in many cases when a single physical act is made punishable by different provisions of law. (*Jones, supra,* 54 Cal.4th at p. 355.)The court noted "It might make sense to punish these distinct evils separately, and a criminal justice system could logically and reasonably do so. But doing so would be contrary to section 654's plain language, which prohibits multiple punishment for '[a]n act or omission that is punishable in different ways by different provisions of law.'" (*Jones, supra,* 54 Cal.4th at p. 356.)

Jones cited with approval *People v. Williams* (2009) 170 Cal.App.4th 587 (*Williams*). There, like here, officers searched a house and adjacent garage and found drugs, sales paraphernalia, and a loaded handgun. The defendant was convicted of possessing a controlled substance while armed (Health & Saf. Code, § 11370.1) and felon in possession of a firearm, among other offenses. *Williams* held the trial court erred by failing to stay the term for felon in possession under section 654 because both acts of firearm possession occurred with the same intent and objective. (*Williams* at p. 645-646.)

Finally, *Jones* recognized and did not disapprove a line of cases allowing multiple punishment under certain circumstances. (*Jones, supra,* 54 Cal.4th at p. 358, fn. 3 ["these cases concern a very different situation, and we do not intend to cast doubt on them"].) The court explained these cases permit multiple punishment when "an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm" because "it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1141.) In other words, " ' "where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand,

where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.'"" (*Jones, supra,* 103 Cal.App.4th at p. 1143.)

Here, the trial court did not find Tyler's firearm possession constituted a divisible transaction from the marijuana offense, or that the evidence showed a possession distinctly separate from that offense. Rather, as noted above, the court stated section 654 did not apply because felon in possession was "a status offense." *Jones* discredited this rationale, which had been used in cases such as *Harrison* and *Hayes*.

Here, investigators found the handgun in Tyler's master bedroom along with substantial quantities of marijuana. It was located in a drawer just below two baggies of marijuana and a digital scale. Tyler initially claimed the gun belonged to another resident in the house, but later admitted he carried the gun in his pocket while the other resident was out of town because he was frightened. The narcotics detective testified, at trial "[i]t's very common that individuals sell drugs, including marijuana, possess firearms. That is to protect the stash, we call it. Protect the drugs from a home invasion robbery or theft." The prosecutor argued "drug dealers . . . carry guns for protection, to protect the stash. Drugs and guns are a common thing. . . . Drug sales and guns go hand in hand. And that's what we have here. . . . *That gun was there to protect those drugs*." (Italics added.) The prosecutor also argued that although Tyler was away from home at the time of his arrest, the gun was available for Tyler's use "in connection with . . . possessing marijuana for sales," and "that marijuana that he is possessing at his home for sales, while he's possess[ing] that, he also has a firearm . . . next to his bed, one drawer below where other baggies of marijuana were found." He emphasized Tyler "had control over that gun during the time that he possessed that marijuana for sales."

Based on the foregoing, no basis exists to infer Tyler's possession of the firearm was *separate* and distinct from his possession of the gun to commit the marijuana offense. (*Williams, supra,* 170 Cal.App.4th at p. 646; see also *People v. Mustafaa* (1994)

22 Cal.App.4th 1305 [defendant pleaded guilty to three robberies, admitted he was personally armed with a firearm on those occasions, and admitted he was a felon in possession of a firearm on each occasion; prison term for possession of a firearm by a convicted felon violated section 654]; *People v. Duran* (1976) 16 Cal.3d 282, 296, fn. 16 [defendant possessed the weapon only during the assault so he could not have been properly sentenced under both violations found against him]; *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1033 [defendant's sentence for both burglary and carrying a concealed weapon violated section 654 because no evidence the defendant possessed the gun before or after the burglary].) The trial court therefore erred by punishing Tyler for both the arming enhancement and the felon in possession offense. Because the marijuana for sale conviction (Health & Saf. Code, § 11359) accompanied by the one-year consecutive arming enhancement (§ 12022, subd. (a)(1)) provided for the longest term of incarceration, the court was required to impose sentence for that conviction and impose and stay execution of the eight-month term for felon in possession. (§ 654 ["shall be punished under the provision that provides for the longest potential term of imprisonment"].)

B. *Prison v. County Jail*

Tyler argues if the court had properly applied section 654, it would have directed him to serve his sentence in county jail rather than state prison because section 1170, subdivision (h), provides a sentence for possession of marijuana for sale with a firearm enhancement shall be served in county jail. We disagree.

The statute prohibiting felons possessing firearms, section 29800, subdivision (a)(1), provides in relevant part, "Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony." (See also former section 12021, subd. (a)(1) [version effective in June 2011].)

Section 18 provides, "(a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170."

Section 1170.1, subdivision (a) provides in relevant part that "Whenever a court *imposes* a term of imprisonment in the state prison, whether the term is a principal or subordinate term, the aggregate term shall be served in the state prison, regardless as to whether or not one of the terms specifies imprisonment in a county jail pursuant to subdivision (h) of Section 1170." (Italics added.)

When a conviction triggers the application of section 654, the proper procedure is to *impose but stay* execution of the duplicative sentence, with the stay becoming permanent upon completion of the sentence for the greater offense. (*People v. Duff* (2010) 50 Ca1.4th 787, 796; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) Here, the court was required to impose and stay execution of the term for felon in possession. Because the court imposed a term, Tyler was required to serve his sentence in state prison.

C. *Conduct Credits*

The parties agree Tyler is entitled to an additional 30 days of conduct credits. The trial court awarded Tyler credit for 60 days actually served in custody plus 30 days of conduct credit for a total of 90 days. The court relied on the probation officer, who correctly reported former section 4019 credits, but failed to account for additional credits under former section 2933. We direct the court to modify its minutes and to prepare an amended abstract of judgment.

III

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to conduct a hearing on Tyler's motions to quash and traverse the warrant and to suppress evidence. In the event the trial court denies the motions, the court shall reinstate the judgment, but stay execution of the term imposed for felon in possession of a firearm under section 654. The court shall also correct its minutes to reflect the section 654 stay and the correct amount of conduct credits. The court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.